THE

AMERICAN LAW REGISTER.

MARCH 1874.

MARRIED WOMEN AS BANKRUPTS.

THE much-vexed question of the rights and liabilities of married women seems to take a new phase in the development of the Bankrupt Act. The act seeks to establish "a uniform system of bankruptcy throughout the United States;" but an examination of the cases under it concerning married women, and the reasons and principles applicable to them, show that so far from the system being uniform in this regard it varies with the statutes and decisions of every state.

In New York, where, since the statutes of 1848 and 1849 and the more recent amendments, it is well known that a married woman may be sued at law upon her contracts, it has been held that she is within the meaning of the act, and can be declared a bankrupt. The Court of Appeals of that state, after much discussion and consideration, has finally arrived at the conclusion that a *feme covert* is bound by all her contracts made in her separate business, or in relation to her separate estate, and that such contracts can be enforced at law or in equity, as the case may be, *Corn Exhange Ins. Co.* v. *Babcock*, 42 N. Y. 642, and judgment may be given against her in the same manner as against other persons; *Hier* v. *Staples*, 51 Id. 136; *First Nat. Bank of Canandaigua* v. *Garlinghouse*, 53 Barbour 615.

And although the question has never been elaborately argued or decided in the Federal courts of that state, it seems to have been taken for granted that they could be proceeded against in bank-

ruptcy, and such has been the practice: *In re Mary A. O'Brien* Bank. Reg., Supplement 38; *Graham, Assignee, &c.*, v. *Stark et al.*, 3 Bank. Reg. 82.

But under the rule in *Yale* v. *Dederer*, 18 N. Y. 265, and 22 Id. 450, at that time the leading case on the subject in that state, that in a suit against a married woman upon a promissory note it must either appear upon the face of the note that it was her intention to bind her separate estate, or it must be alleged that the note was given for the benefit of her separate estate, Judge HALL decided in *In re Howland*, 2 Bank. Reg. 114, that a petition in bankruptcy must follow the same principle, and that the allegation that the respondent had a separate estate, and intended in the execution and delivery of the notes to bind it was not sufficient, such intent not appearing upon the face of the instrument, and there being no allegation in the petition that the indebtedness was of such a character as to be a charge upon her estate, he dismissed the petition with leave to amend.

One of the more recent cases, *Foster* v. *Conger*, 61 Barbour 145, decided at general term, maintains the advanced doctrine that a married woman may sue and be sued upon all contracts or liabilities made or incurred in her business; that such action may be brought in the same manner as against any other individual; that the judgment is personal, to be enforced against any property she may have, liable to execution as in ordinary cases; that her obligation and liability are precisely the same as if she had never been married; and that it was not of the slightest consequence that she had no separate estate before engaging in the business in which the debt was contracted, nor that the debt was not contracted for the benefit of her separate estate. In any place where this should be the settled law, there certainly could be no objection to the jurisdiction of the bankrupt court.

It was upon the same principle announced by Judge BLATCHFORD, though not carried to the same extent, that Judge GRESHAM decided the recent case *In re Rachel Goodman*, reported in the "Chicago Legal News," for October 1st 1873. That was a petition in the usual form upon an indebtedness for goods sold and delivered, but containing no special allegations other than that the respondent was a married woman, engaged in business in her own name; but inasmuch as by the laws of Indiana a married woman, although protected in her separate

estate, and authorized to carry on business if she have such estate, is not bound by her contracts except in reference to her separate property, and cannot enter into a partnership with her husband, nor retain her personal earnings, the court held that the petition was fatally defective in not setting forth that she had a separate estate. No doubt this is the correct rule, and that a petitioner must show affirmatively sufficient to bring a married woman within the law. We are not aware that it has yet been held under any statute or in any court that a married woman is bound absolutely by all her general engagements. Though the tendency may be in that direction, that ultimate point does not seem anywhere to have been reached.

In Minnesota, where many of the common-law disabilities have been removed by statute, and where a married woman may, under certain circumstances, engage in business in her own name by obtaining a license from a probate justice, in which case she is bound by her contracts entered into in the course of her business, Judge NELSON held that a married woman engaging in business as a member of a partnership, but without having complied with the requirements of the statute, could avail herself of her coverture to defeat bankruptcy proceedings against her: *In re Slichter*, 2 Bank. Reg. 107.

The liability of married women has recently been carried in Illinois to as great an extent as in any of the United States, the Federal courts here, as elsewhere, following the doctrines and applying the principles of the state tribunals.

The statute of 1861, giving a married woman the right to property which she owned at the time of her marriage, or might subsequently acquire from any person other than her husband, was the first innovation upon the old common-law rule, and since that time the Supreme Court of that state, through a long course of decisions, commencing with *Emerson* v. *Clayton*, 32 Ills. 493, has been gradually giving to married women more absolute control over their separate estate and personal remedies to enforce their rights, but at the same time retaining the old equity doctrine that proceedings against them must be in equity. This was the rule as late as *Mitchell* v. *Carpenter*, 50 Ills. 470.

But in the later case of *Cookson* v. *Poole*, reported in 5 Chicago Legal News 184, and under the influence of the statute of 1869, giving to a married woman the right to her personal earn-

ings, the court on a review of the former decisions holds that a married woman holding property has the legal capacity to contract in relation to it, such contracts are cognisable by courts of law, and that her estate is no longer a mere creation of equity, but an absolute legal estate.

Under this state of the law Judge BLODGETT, of the U. S. District Court for the Northern District of Illinois, held in the *Kinkead* case, reported in 7 National Bankr. Reg. 439, and recently affirmed by Judge DRUMMOND in the Circuit Court, that a married woman could be a partner in business with her husband, and as such be adjudged a bankrupt; that as she had been held out to the world as a partner equally with her husband, and as the firm had acquired assets and contracted liabilities a court of bankruptcy could take jurisdiction of the whole estates, and administer them under the law, and in this case Judge BLODGETT went further, and placed the jurisdiction of the court also upon the broader ground of a court of equity, marshalling the assets of the several estates, and distributing them among the parties according to their equitable interests, a doctrine which does not seem to have been previously broached. He held that for the purposes of that case the bankrupt court was clothed with all the powers of a court of equity, and that bankruptcy having intervened the court should distribute the assets without reference to the question whether the creditors had any further remedy to recover any unpaid balances.

And since the above decision the Supreme Court of Illinois has gone far beyond all its previous decisions, and in the case of *Martin* v. *Robson*, 5 Chicago Legal News 304, has swept away most of the ancient landmarks as to the rights and liabilities of *femes covert*, and in Illinois, so far as their separate estates are concerned, and as to their rights and liabilities in cases of tort, they may now be considered as occupying the legal position of *femes sole*. That court, in an elaborate opinion by THORNTON, J., reviewing all its previous decisions, declares that a married woman has the right not only to her personal earnings, but to her time, with which she may acquire these earnings; that the husband is no longer liable for her debts before marriage, nor her torts afterwards; that she need not join her husband in suits at law for property, trespass or slander, but may even bring suit against him; that she may be sued at law on her contracts, and execute a valid lease of her separate property; and that, since the legal supremacy

of the husband is gone, and she has the control of her own property, time and skill, she alone should be responsible for slander uttered by her during coverture, and that the necessary operation of the statute is to absolutely discharge the husband from such liability.

As these few scattered cases, together with the ruling of the United States District Court for the Northern District of Illinois, in the case of *Harriett E. Collins*, not yet reported, that the court has jurisdiction of a voluntary petition by a married woman, constitute all the reported authorities in the United States, we must look for a more elaborate and logical discussion of the questions in the courts of England, the provisions of whose Bankrupt Act in this respect are similar to our own.

It would seem to be the rule that any person capable of making a binding contract is amenable to bankruptcy proceedings, and that in so far as the common-law disabilities of a *feme covert* are removed she comes within the jurisdiction of the Bankrupt Law.

This rule, which is as consonant to reason and justice as it is capable of general application, seems first to have been stated by Cooke in his work on Bankruptcy, published a full century ago, in which he says: "The criterion, therefore, of a *feme covert* being capable of falling under the bankrupt laws, appears to be her liability to be sued to execution for the debts she has contracted during coverture. A commission of bankruptcy is considered as a statute execution. If a married woman is so circumstanced as to be subject to a common-law execution, there does not occur any reason why she should not likewise be subject to this statute execution."

It was upon this principle that when, in 1772, the commissioners refused to find Mrs. Anne Fitzgerald a bankrupt, because although she had property settled upon her, and had entered into a deed of separation from her husband, she was a *feme covert*, residing in the county of Middlesex, and not a trader in the city of London, Lord Chancellor APSLEY, on appeal, ordered the commissioners to declare her a bankrupt, and the messenger to take possession of her property. The authority of this case is supported by Lord MANSFIELD in *Ringstead* v. *Lanesborough*, 3 Douglas 197, and *Barwell* v. *Brooks*, and *Corbet* v. *Polnitz*, 1 Term R. 5.

The same general principle is evidently the reason of the rule according to which persons who could not otherwise have been pro-

ceeded against in bankruptcy have, by trading, become amenable to the proceedings, even though such trading may have been positively prohibited by law. Thus a clergyman may become a bankrupt, *Ex parte Meignot*, 1 Atkyns 196, even though in priest's orders, *Hankey* v. *Jones*, Cowper 745; a public officer, *Highmore* v. *Mallory*, 1 Atkyns 206; an executor, if he continues the testator's business beyond what is necessary to close up the estate; *Ex parte Mott*, 1 Atkyns 102; *Ex parte Garland*, 10 Vesey 110; *Viner* v. *Cadell*, 3 Espinasse 88.

The remedy for the creditor by petition would certainly seem to be at least co-extensive with the liability of the debtor; for an infant, if he has held himself out as a trader and *sui juris*, has been held amenable, *Ex parte Adam*, 1 Vesey & Beames 494; or has affirmed the debt after attaining his majority, *Belton* v. *Hodges*, 9 Bingham 360; or if at the time of contracting the debt he made express statements that he was of age, *Ex parte Watson*, 16 Vesey 265; *Ex parte Bates*, 2 Montague, Deacon & DeGex 337.

The doctrine that a *feme covert*, who has been deserted by her husband, and been trading as a *feme sole*, should be held on her debts, has the authority of the U. S. Supreme Court. In *Rhea* v. *Rhenner*, 1 Peters 108, this is stated to be the well settled rule, the court citing both English and Massachusetts authorities, and arguing that the rule is for the benefit of the *feme covert*, as otherwise she could not obtain credit, and would have no means of gaining a livelihood.

In England, as far back as the earliest days of the custom of London, a married woman, who, as a trader, had contracted debts, might be proceeded against in bankruptcy: *Lavie* v. *Philips*, 3 Burrow 1783; *Ex parte Carrington*, 1 Atkyns 206; *Ex parte Franks*, 7 Bingham 762.

But the leading case is *Johnson* v. *Gallagher*, 30 Law Jour. 298, in which TURNER, L. J., elaborately discusses the rights and liabilities of married women, and after a review of the cases as to their right to charge or encumber their separate estates, and their liability upon notes. bills and specialties, concludes that not only these but also their general engagements may affect their separate estates; that where a woman was living separate from her husband, and had a separate estate, the court is bound to impute to her the intention to deal with her separate estate unless the contrary is

clearly proven ; that the court cannot impute to her the dishonesty of not intending to pay for the goods she purchased; but that in order to bind her separate estate by a general engagement it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so made was a question to be judged of by the court upon all the circumstances of the case. This case was expressly approved in *Mrs. Matthewman's Case*, L. R. 3 Eq. 781, in which a married woman was held to be a contributory to a joint stock company ; in *Picard* v. *Hine*, L. R. 5 Ch. App. 274, and by Lord ROMILLY, Master of the Rolls, in *McHenry* v. *Davies*, L. R. 10 Eq. 88.

It will be seen, therefore, that the liability of married women had already been considerably extended at the time of the passage of the Married Women's Property Act, August 9th 1870. All of the above decisions were rendered before that time, and as that act gives, among other things, to married women the right to their separate earnings, there can be no question that their liability under their general engagements is still further extended.

There seems to be no doubt as to the rule that a married woman may be a voluntary bankrupt wherever there is a liability either of the person or of the estate to be discharged.

Our Bankrupt Law says: § 11, "Any person residing within the jurisdiction of the United States, *owing debts*, &c.," may be adjudged a bankrupt; also, § 39, "Any person residing and *owing debts* as aforesaid," &c.; and these two are the jurisdictional sections in voluntary and involuntary bankruptcy. Where a woman may *owe* she may be bankrupt; where she cannot there is nothing upon which to found the proceedings. Her capacity to owe can only be determined by state legislation or interpretation; one state may establish one rule, and another a different rule; but Congress has no jurisdiction to legislate on the subject; such power was not granted in the Constitution, and is reserved to the states.

The foundation of bankruptcy proceedings is indebtedness; without this there is no basis for jurisdiction. Thus a simple promise, or a note without consideration, not being a legal claim, is not such a demand as will support proceedings in bankruptcy: *In re Cornwell*, 4 Bankrupt Reg. 134 Nor is an infant, as to his general engagements, a subject of either voluntary or involuntary bankruptcy: *In re Derby*, 8 Bankr. Reg. 106.

Impossible as it may be to reconcile the decisions on the general question of the rights and liability of married women, the duty of the Federal courts in applying the Bankrupt Law in these cases would seem to be of a simpler character. If they determine the status of a married woman under the existing law of the state where the jurisdiction is to be exercised, and administer the Bankrupt Law upon the basis of the principles thus discovered, they have done all that can be required. The application of the Bankrupt Law to married women depends clearly, not upon their rights, but their liabilities. Those liabilities are determined by the law of the forum where the jurisdiction is invoked.

The Bankrupt Act does not make any new standard of liability, but simply operates upon those already existing.[1] Wherever a married woman cannot contract a legal debt she has no need to be discharged from it, and the creditor can have no standing in court, as his claim in such case has no substance or legal entity. In a jurisdiction where her estate is but a creature of equity, the creditor should lay the proper foundation for proceedings against it, and use apt words to charge it. Where she may be sued either in law or chancery no more specific allegations seem to be necessary than would sustain an ordinary action against her at common law or in chancery, as the case might be. Where she can be a partner with her husband she can also be adjudged a bankrupt in proceedings against such partnership.

And if any state shall go so far beyond *Martin* v. *Robson* as to place a married woman on the same legal footing as her husband, there will be no more difficulty in the bankruptcy of the one than of the other. In all cases where a plea of coverture would not avail her, a married woman may be proceeded against in bankruptcy.

This varying rule in different jurisdictions is therefore not such an irregularity as the exemption clause, the constitutionality of which was at first doubted, for there is a clear underlying principle to which the various decisions may be referred, and by which they may be reconciled.

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[1] It does not undertake to establish a uniform rule for the legality of contracts or the liability of persons, any more than it does to establish a uniform statute of limitation or a general statute of frauds, or a certain age at which infancy shall cease and liability commence, or decide whether remedies shall be at law or in equity.